United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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P/S

75-1071

To be argued by
DON D. BUCHWALD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1071

UNITED STATES OF AMERICA,
Appellee,

—v.—

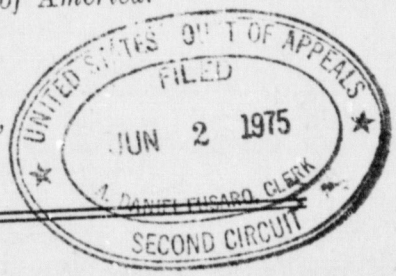
JOHN VAN ORSDELL,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DON D. BUCHWALD,
LAWRENCE S. FELD,
Assistant United States Attorneys, Of Counsel.



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Preliminary Statement

John Van Orsdell appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on January 10, 1975, after a seven-day trial before the Honorable Whitman Knapp, United States District Judge, and a jury.

Indictment 74 Cr. 193, filed on February 22, 1974, charged Van Orsdell with conspiring with two unindicted co-conspirators—Robert Greenman and Inese Gerke *—to violate Title 18, United States Code, Section 876 in violation of Title 18, United States Code, Section 371 (Count One) and with mailing, with the intent to extort approximately $320,000, from the Concord Hotel ("Concord"), a letter to the hotel which threatened to dose its guests with quantities of LSD in violation of Title 18, United States Code, Section 876 (Count Two).

* Greenman and Gerke testified as Government witnesses at trial.

Trial commenced on November 6, 1974 and concluded on November 15, 1974 when the jury found Van Orsdell guilty on both counts.

On January 10, 1975, Judge Knapp sentenced Van Orsdell to a prison term of two years on Count One to be followed by five years probation on Count Two.

Van Orsdell is at liberty pending this appeal.

Statement of Facts

The Government's Case

The evidence established that on June 30, 1973, Van Orsdell and a 19-year-old accomplice, Robert Greenman ("Greenman") mailed a letter from Manhattan to Mr. Robert Parker, General Manager of the Concord Hotel, a large Catskill Mountain resort, (the "Parker letter"), which threatened to dose 100 guests of the Concord with quantities of LSD unless $320,000 was paid by the hotel.* Instructions for the payoff were contained in the four-page typewritten single-spaced Parker letter, which Van Orsdell authored and signed in crayon under the pseudonym of "Crayola" (Tr. 57-58, 207-210, 224-228).**

The letter called for delivery by a female employee of the Concord on the afternoon of July 6, 1973 of $320,000 in old one hundred dollar bills evenly divided in two TWA travel

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* On May 26, 1973, Van Orsdell and Greenman visited both Grossinger's, another resort, and the Concord and decided upon the latter for the extortion plot (Tr. 196-206). Page references with the prefix "Tr." refer to the trial transcript. "A." refers to the Appellant's Appendix.

** The Parker letter, admitted at trial as Government Exhibit ("GX") 1, was annexed to and incorporated by reference in the indictment. It appears at Tr. 30-37.

bags. The female employee would receive further instructions over the telephone when she arrived at the 45th Street and 5th Avenue address specified in the letter. The letter cautioned against calling in the FBI and ended with the following explicit warnings:

> "A word of warning—So much as *entertain* the notion of trying to put us out of business, and highly motivated associates of ours will descend upon you with orders to annihilate.
>
> "And finally . . . bear in mind what we said at the beginning about making the correct decisions over the next few days.
>
> "Heed the advice of the professionals you consult.
>
> "If your proclivity is to stand self-righteously on principle . . . curb it.
>
> "If you want to think that all this is just one great big sick hoax . . . think again.
>
> "If you are tempted to gamble that we're just bluffing . . . *think* of what happens to other people's brain tissue if you're wrong.
>
> "And then weigh the odds.
>
> "And then weigh the stakes."*

Following the instructions in the Parker letter, and further telephone instructions from Van Orsdell at the designated time for the payoff on July 6, 1973, a female FBI agent dropped two TWA bags, each filled with fake money,

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* On July 3, 1973 and July 5, 1973 Van Orsdell sent two follow-up telegrams to Parker (Tr. 66-68). The first authorized a ten per cent reduction from the $320,000 originally demanded if the "constabulary" was not contacted (GX 2). The second telegram warned in substance that the "toothpaste", once out, could not be put back in the "tube" (GX 3).

through a broken window of a locked door leading to a ladies rest room in Grand Central Station (Tr. 102-113).* Twenty-year-old Inese Gerke, who secreted herself behind the locked door after entering from an upstairs entrance, hauled in a TWA bag with a rope attached to a portion of rug which she had previously placed beneath the broken glass (Tr. 466-473).**

She escaped through the upstairs entrance, joined Van Orsdell and Greenman outside the Pan American Building, and the three of them proceeded by taxi to the East New York Savings Bank on 64th Street and Third Avenue (Tr. 245-46, 473-74). There they proceeded to a safe deposit box number 338 (rented three days earlier by Van Orsdell and Greenman under the aliases of "Calvin Morrow" and "Robert Diamond" (Tr. 228-232)). They opened the TWA bag, discovered that the money was fake, and also found a transmitting device concealed in the strap of the bag*** (Tr. 248, 474-75). They panicked, left the bank, threw out the transmitting device in a stairwell, returned by subway to Greenman's home in Queens, and proceeded to the Staten Island ferry from which they threw the TWA bag containing the fake money into the river (Tr. 249-255, 475-478).

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* The FBI agent was equipped with a recording device. Only her voice in the telephone conversation with Van Orsdell was picked up on the recordings (Tr. 102).

** The glass had been etched during a practice run by Gerke, Greenman and Van Orsdell the preceding evening and had been broken by Greenman earlier on July 6th (Tr. 464-65, 469). The ladies room with two entrances on different floors had been found by Gerke pursuant to Van Orsdell's instructions after a search lasting several weeks (Tr. 457-462). The rug, on which the TWA bag was hauled in by rope, came from Greenman's basement (Tr. 467).

*** The transmitting device, unbeknownst to the conspirators, had malfunctioned.

That night, fearful that their instructions to the cab driver to proceed to the bank had been monitored by the authorities, and that the fingerprints on the phoney safe deposit box application would eventually be linked to Van Orsdell (who had been fingerprinted while in the Navy), Van Orsdell suggested to his young accomplices that they pretend that they had been politicaly motivated. They drafted a letter to the FBI (subsequently mailed to the FBI in New York) which, in substance, demanded the release of Timothy Leary, or else they would expose the FBI's "bungling" (Tr. 256-259, 297-298, 479-483; GX 19A). In August, they placed an advertisement in the Village Voice ("Crayola: Two, FBI: Nothing") and attempted to place a second advertisement ("Crayola: Five, FBI: Nothing") (Tr. 730).

To refute the claim of political motivation, the Government introduced evidence of Van Orsdell's substantial indebtedness. Since 1968, when he left Newsweek as a copywriter, Van Orsdell's only income had been $10,000 in 1971 for his authorship of the novel *Ragland* * and $1,000 in the Spring of 1972 for his role as coordinator of a Republican Congressional primary campaign in Pennsylvania of Conservative candidate, Charles Holt. Within the two years preceding the mailing of the Parker Letter, Van Orsdell had twice been evicted from high rental apartments. He still owed thousands of dollars to both landlords as well as to Bank Americard and others. New manuscripts he had authored had been consistently rejected (Tr. 161-188, 789-819). Over thirty thousand dollars invested by others in a production company he had formed had been completely expended by him on such items as rent, a trip to London and a Caribbean cruise (Tr. 800, 803-804).

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* In the novel, FBI agents had been favorably portrayed.

The Defense Case

Van Orsdell admitted writing and mailing the Parker Letter but testified that his purpose was not to extort money, but rather to expose what he perceived to be reckless practices of the FBI. He testified that he had been approached in February 1973 by a former Justice Department or FBI official who had identified himself only by the name "Herbert Vore" (a name from Ragland) and whose true identity Van Orsdell never requested or learned. "Vore" educated him as to the sinister practices of the FBI, and, at Vore's behest, Van Orsdell devised the Concord—LSD scheme, which, when subsequently publicized through a movie, would expose the FBI's practices to public scrutiny. Through such a movie, Van Orsdell maintained, he intended to publicize the FBI's practice of using fake money in extortion situations, a practice which, he maintained, recklessly endangered the lives of third parties (Tr. 684-714, 748-70). Van Orsdell testified that he always intended to get fake money (Tr. 536, 785).

To support this "political theory," the defense pointed to the July letter to the FBI, the Village Voice Advertisements, and to Van Orsdell's disclosure of the "Crayola Caper" in September, 1973 (prior to his arrest on October 5, 1973) to Robert Boyle, editor of the Pottstown Mercury, and Joseph Spear, an associate of Jack Anderson's.*

To rebut the defense's "political theory," the Government pointed to Van Orsdell's substantial indebtedness at the time of the incident, to the fact that he and Greenman had

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* Van Orsdell told Boyle, however, that if real money had been delivered, he would have sent it to the Timothy Leary Defense Fund (Tr. 603). He told neither Boyle nor Spear about "Herbert Vore" (Tr. 738). Rather, he told Spear that he had first heard about the FBI's use of fake money in extortion situations several years previously from an FBI agent on a plane ride from Atlanta (Tr. 537, 556). Spear testified at the trial (Tr. 522-578). The testimony of Boyle, who was recovering from a heart attack, was stipulated (Tr. 602-604).

"cased" the Concord in late May, 1973, to the fact that he had thrown the fake money into the river, and to the testimony of his two young accomplices recounting Van Orsdell's decision on the evening following the "payoff" to *claim* that the "caper" was "politically motivated." Van Orsdell's pre-arrest contacts with the press, the Government argued, were part of his cover-up in contemplation of arrest.

ARGUMENT

The District Court's inquiry concerning alleged electronic surveillance was more than adequate.

Defendant's sole claim on appeal relates to the sufficiency of the Government's electronic surveillance and wiretap disclosures.

A. Sufficiency of the Harwood Affidavits

Van Orsdell moved before trial for the disclosure of all records of electronic surveillance and wiretaps (Defendant's Rule 16(b) motion, ¶ 13, dated April 23, 1974). The Assistant United States Attorney then assigned to the case responded by way of affidavit to the request as follows:

> "I am informed by the Federal Bureau of Investigation agent in charge of the investigation of this case that the defendant was not the subject of any electronic surveillance or wiretaps, except for attempts to record conversations from the extortionists to the victim and the ransom carrier and a device which was attached to the ransom play money turned over to the extortionists. I am informed that no government agent connected with this case is aware of any wiretapping of defendant's telephone conversations or the installation of any electronic surveillance device in the defendant's apartment."*

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* Affidavit of Assistant United States Attorney Frank Wohl, ¶ 4, dated May 13, 1974.

During oral argument on the motion, the Government agreed to conduct an all-agency inquiry and submit affidavits from the various agencies in accordance with the required procedures. *United States* v. *Toscanino*, 500 F.2d 267, 281 (2d Cir. 1974). The defense agreed to the submission of such affidavits, reserving the right to request an evidentiary hearing if the affidavits proved to be inadequate.*

Eight agency affidavits, including one from the F.B.I., were obtained and submitted to the defense prior to trial. (Tr. 2-4; A. 5). At the commencement of the trial the defense took exception solely to the October 11, 1974 affidavit of F.B.I. Special Agent Harwood (Tr. 2-5; A. 5).

Harwood stated in his original affidavit that he determined from his search of appropriate F.B.I. records that "no one identifiable as John Calvin Van Orsdell, born August 23, 1933, was the subject of a direct electronic surveillance" by the F.B.I. The affidavit went on to state that Van Orsdell's July 6, 1973 telephone conversation with the female F.B.I. agent had been "consensually monitored" and that the results of the "aforementioned *overhearing*" had been previously forwarded to the Justice Department.** "Other than the above," the affidavit continued, Harwood determined from his review that Van Orsdell "was never monitored by any other electronic device" of the F.B.I., "nor was an electronic surveillance maintained on premises which were known to have been owned, leased, or licensed by him" (A. 5).

The defense objected at the commencement of the trial to two aspects of the Harwood affidavit, namely (1) the use

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* Transcript of May 14, 1974 pre-trial conference before Judge Bauman, pages 23-25. The case was originally assigned to Judge Bauman before being reassigned to Judge Knapp.

** Prior to trial, a transcript of the telephone conversation had been provided to the defense. (GX 3502 B listed on Court Exhibit 9.)

of the word "direct" (which, the defense suggested, raised the possibility of "indirect" electronic surveillance) and (2) the use of the phrase "no one identifiable as John Calvin Van Orsdell" (which, the defense suggested, raised the possibility that someone identifiable as "Crayola" had been subjected to electronic surveillance) (Tr. 3). Judge Knapp thereupon ordered the filing of a supplemental affidavit to cover the two points and invited the defense to re-raise the issue if the supplemental affidavit failed to adequately cover the points (Tr. 5).

After the jury's verdict but two weeks prior to the sentencing, a copy of Mr. Harwood's supplemental affidavit was forwarded to the defense (Jan. 10, 1975 sentencing Transcript, p. 2). In the supplemental affidavit Harwood stated that "it was not [his] intention to equivocate in any manner whatsoever through the use of the word 'direct' " in his original affidavit. Harwood further stated that based on his previous search of F.B.I. records he had determined "that no one identifiable as John Calvin Van Orsdell or anyone by his known aliases, including Crayola, was ever monitored by any electronic device" of the F.B.I. (A. 5). Neither prior to the sentencing nor at the sentencing did the defense raise any objection to the supplemental Harwood affidavit.

Having declined Judge Knapp's invitation to renew the claim below following submission of the supplemental affidavit, Van Orsdell asserts for the first time on appeal that the Harwood affidavits are insufficient on their face because "they fail to affirm or deny whether defendant was *overheard* by any electronic surveillances" (Appellant's Brief, p. 8). The assertion (even assuming, *arguendo*, that a specific denial of "overhearings" as opposed to "electronic surveillances," "monitoring," etc., is required in such agency affidavits) is simply inaccurate. The July 6, 1973 "overhearing" of Van Orsdell's telephone conversation with the female F.B.I. agent was set forth in the initial F.B.I. affi-

davit followed by the unequivocal statement that "*other than the above,* Van Orsdell was never monitored by *any other* electronic device." Appellant's newly-asserted ambiguity in the affidavits is simply not an ambiguity at all.* Denial of electronic surveillance by way of the agency affidavits was unequivocal and sufficient. *United States* v. *Grusse,* Dkt. No. 75-2029 (2d Cir. February 27, 1975), slip. op. 2039; *United States* v. *Toscanino,* 500 F.2d 267, 281 (2d Cir. 1974); *United States* v. *See,* 505 F.2d 845, 856 (9th Cir. 1974); *Korman* v. *United States,* 486 F.2d 926, 931 (7th Cir. 1973); *In re Weir,* 495 F.2d 879, 881 (9th Cir. 1974), *cert. denied,* — U.S. —; *United States* v. *Alter,* 482 F.2d 1016, 1027 (9th Cir. 1973); *Beverly* v. *United States,* 468 F.2d 732, 744 (5th Cir. 1972); *United States* v. *D'Andrea* 495 F.2d 1170, 1173 (3d Cir. 1974), *cert. denied,* — U.S. —; *United States* v. *Doe,* 451 F.2d 466, 467 (1st Cir. 1971).

B. Sufficiency of the Surveillance Hearing Below

Van Orsdell was arrested in Philadelphia on October 5, 1973 (Tr. 744). Greenman had been arrested by FBI agents earlier that same day after leaving the East New York Savings Bank and obtaining a copy of the Parker Letter from safe deposit box number 338. Two days earlier, Joseph Spear (Jack Anderson's associate) had asked Van Orsdell for proof of the plot, and Van Orsdell had called Greenman to obtain the copy of the letter.

Appellant contends that he *must* have been subjected to electronic surveillance because "it was only after making a phone call from Jack Anderson's office that defendant was

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* Furthermore, having failed to assert below that the affidavits were facially insufficient insofar as they failed to specifically deny "overhearings", appellant is barred from raising it on appeal. *United States* v. *Indiviglio,* 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied,* 383 U.S. 907 (1966); *United States* v. *Bryant,* 480 F.2d 785, 792 (2d Cir. 1973).

arrested" * and "the timing between the phone call from the office of Jack Anderson and the arrest" gives rise to the "presumption of a connection between the two events." (Appellant's Brief, pages 9 and 11).

Appellant's entirely speculative contention that the sequence of events gives rise to a "presumption" of illegality worthy minimally of a hearing breaks down on several scores. In the first place, it totally ignores the fact that a hearing *was* held below out of the jury's presence during which, the defense examined Frederick Behrends, the FBI case agent most intimately involved in the Van Orsdell investigation (Tr. 490-511).** Secondly, the facts in appellant's brief, upon which its presumption is grounded, substantially conflict with the trial testimony of three witnesses, including the defendant himself.

(1) Behrend's Testimony

The FBI's October 5, 1973 visual surveillance of the bank *was* explained by Agent Behrends at the hearing below (Tr. 490-511). Van Orsdell's identity and the fact that he had gone to a bank on East 64th Street had been ascertained by the FBI in late August or early September from a confidential source.*** Behrends located two banks (including the East New York Savings Bank) on East 64th Street. He obtained from the bank a listing of all safety

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* The trial testimony of three witnesses—Joseph Spear, Greenman, and Van Orsdell himself—established that Van Orsdell made no such call from Anderson's office but rather from Philadelphia. See text, *infra*, pp. 12-13.

** Following Behrends testimony, Judge Knapp invited the defense to make a further post-trial motion if it deemed appropriate (Tr. 510). No such motion was made however.

*** Behrends testified that the confidential source was a human being not employed by the FBI who was known personally to him and was not a wiretap or any form of electronic surveillance (Tr. 499-501).

deposit boxes entered on July 6, 1973 (which included the Calvin Morrow-Robert Diamond Box number 338) and forwarded the information obtained down to the FBI's Washington Office where it was compared with information on Mr. Van Orsdell gathered in September, 1973 by agents of the FBI. On October 4, 1973 the Washington office of the FBI advised the New York office that Van Orsdell's parents' first names, Mary and Edward, were the same as the parents names listed on the Calvin Morrow safe deposit box application. In addition, the day and month (but not the year) of Van Orsdell's birth date (August 23rd) were the same as those listed on the Calvin Morrow application. The information was conveyed to Behrends on the evening of October 4th and, the connection between Van Orsdell and the Calvin Morrow safe deposit box having now been made, surveillance was commenced at the bank on the following day. (Tr. 504-509).

(2) Appellant's "Presumption of Illegality" Theory

Appellant totally ignores on appeal the Behrends testimony and the explanation as to the basis for the initiation of the Box 338 surveillance on October 5, 1973. In addition, however, the "facts" cited in appellant's brief as giving rise to the "presumption of illegality" are wholly inconsistent with the trial testimony of three witnesses, including the defendant himself.

Appellant's speculation on appeal, that while not the subject of "direct" surveillance, his phone call to Greenman from Jack Anderson's Washington office was surreptitiously "overheard" (presumably by a tap on Anderson's phone) totally breaks down in light of the uncontradicted trial testimony of three witnesses—Spear, Greenman, and *Van Orsdell himself*—that Van Orsdell did not call Greenman (or anyone else) from Anderson's office but rather from Philadelphia (Tr. 271, 399-401, 538, 743-744).*

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* Van Orsdell's wife lived in Havertown, Pennsylvania (Tr. 179).

Furthermore, on the basis of Spear's trial testimony,* no overhearing of any conversation in which *Spear* participated could *possibly* have resulted in either the apprehension of Van Orsdell or the October 5, 1973 surveillance of the bank.**

Indeed, prior to Van Orsdell's arrest on October 5, 1973, he had never told Spear either in person or on the telephone (1) his own real name (Tr. 545),*** (2) the names of either of his accomplices, or (3) the name or address of the bank they had gone to (Tr. 533, 538). Hence, no information leading to the October 5, 1973 FBI surveillance of Greenman at the East New York Savings Bank could have been obtained from surreptitious surveillance of Spear's conversations.****

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* Spear was called as a defense witness (Tr. 521-522).

** Van Orsdell, using the name "Spendlove," first called Anderson's office and spoke with Spear on September 24th or 25th. No details of the Concord-LSD plot were discussed at that time but an appointment was made for Friday, September 28th (Tr. 524-526). On September 28, 1973, at Anderson's Washington office, "Spendlove" provided various details of the plot to Spear (Tr. 529-538) and at the conclusion of the meeting identified himself as "Crayola" (Tr. 538). He did not, however, tell Spear the name or address of the bank (Tr 533). Van Orsdell next called Spear from Philadelphia on Wednesday, October 3, 1973 (Tr. 538-540, 743-744) and agreed to send him the Parker Letter. That night, Van Orsdell called Greenman at Greenman's home in Queens and told him to get the letter from the bank (Tr. 271, 399-401, 743-744). Greenman did not, however, go to the bank until October 5, 1973, the day on which FBI surveillance of the bank commenced (Tr. 498; GX 3504B). Spear first learned Van Orsdell's true name from Van Orsdell's defense attorney on the telephone on October 5th, following Van Orsdell's arrest (Tr. 545).

*** Van Orsdell had identified himself to Spear only as "Spendlove" and "Crayola."

**** Van Orsdell would in addition, lack standing to object to the electronic surveillance of any conversation at Anderson's office in which Van Orsdell himself did not participate. *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). *United States* v. *Bynum*, Dkt. No. 72-1857 (2d Cir., March 26, 1975), slip op. 2521 at 2523; *United States* v. *Capra*, 501 F.2d 267, 281 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3515 (March 25, 1975).

(3) Appellant is not entitled to a further hearing

Evidentiary hearings, as this Court has repeatedly held, "should not be set as a matter of course, but only when the petition alleges *facts* which if proved would require the grant of relief." *Grant* v. *United States*, 282 F.2d 165, 170 (2d Cir. 1960) (emphasis added); see also *United States* v. *Culotta*, 413 F.2d 1343, 1345 (2d Cir. 1969), *cert. denied*, 396 U.S. 1019 (1970); *United States* v. *Pardo-Bolland*, 229 F. Supp. 473, 475 (S.D.N.Y. 1964), *aff'd*, 348 F.2d 316 (2d Cir.), *cert. denied*, 382 U.S. 944 (1965); *United States* v. *Brown*, 511 F.2d 920, 922-23 (2d Cir. 1975); *See also*, *Cohen* v. *United States*, 378 F.2d 751, 760-61 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967); *United States* v. *Cranson*, 354 F.2d 123, 126-27 (4th Cir. 1971).

The situation here is not one where an admittedly illegal electronic surveillance has taken place and the issue is whether evidence against the defendant was the fruit of such surveillance (*cf. Alderman* v. *United States*, 394 U.S. 168 (1969); nor is this a case where electronic surveillance has admittedly occurred and the issue is whether the defendant himself was overheard (*cf. United States* v. *Smilow*, 472 F.2d 1193 (2d Cir. 1973)). Rather this is a case in which the existence of any electronic surveillance has already been denied under oath by the case agent most closely connected with the case at a hearing already held and where agency affidavits have been submitted listing the only known overhearing of the defendant (a censual monitoring) and denying any record of other surveillance. Under such circumstaces, notwithstanding purely conjectural claims of "presumptive illegality", which are belied by the record, no further hearing is necessary or appropriate. *United States* v. *D'Andrea*, *supra*; *United States* v. *See*, *supra*.

C. Identity of the Confidential Informant

Appellant's final contention is that he was entitled to know the name of the confidential source who initially supplied his name to the FBI.

The Government is required to disclose the identity of an informant where it is shown to be "relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause. . . ." *Roviaro* v. *United States*, 353 U.S. 53, 60-61 (1957). Each case turns on its own peculiar circumstances. *Id.* at 62; *United States* v. *Russ*, 362 F.2d 843, 844 (2d Cir. 1966).

As stated by the Supreme Court in *Roviaro, supra*, 353 U.S. at 59:

> "The privilege [protecting the anonymity of confidential informants] recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."

No explanation was offered by the defense below as to how the source's identity would be either relevant or helpful to Van Orsdell's defense. The source played no role whatsoever in the extortion plot itself, did not participate in the criminal transactions in any way, and only "tipped-off" the authorities several weeks after the criminal events.* There was no issue below of either mistaken identity or entrapment. See *United States* v. *Russ, supra*, at 345; *United States* v. *Coke*, 339 F.2d 183 (2d Cir. 1964); *Gordon* v. *United States*, 438 F.2d 858, 875 (5th Cir. 1971); *United States* v. *Dioguardi*, 332 F. Supp. 7, 15 (S.D.N.Y. 1971).

If, as appellant suggests in his brief (p. 17), the source "participated in or witnessed a conversation" with the defendant, Van Orsdell need only review his own memory to recall whom he spoke with. As to the so-called "crucial" element of intent (Appellant's brief, p. 17), the testimony of the informant, in any event, at best would have been

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* The source came forward in August or early September, 1973 (Tr. 503, 509).

cumulative.* See *United States* v. *Coke, supra; United States* v. *Simonetti,* 326 F.2d 614 (2d Cir. 1964).

John Van Orsdell's preposterous story about "Herbert Vore" and his own alleged desire to obtain fake money was rejected by the jury after a fair trial and was found by the District Court below to have been "deliberately perjurious." ** His claims of error presented on this apeal are as spurious as the defense he presented below.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DON D. BUCHWALD,
LAWRENCE S. FELD,
Assistant United States Attorneys,
Of Counsel.

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* On the issue of intent, in addition to Van Orsdell's own testimony, the defense offered the testimony of Joseph Spear, Robert Boyle, Wayne Adams and Van Orsdell's wife.

** Transcript of sentencing minutes, January 10, 1975, p. 24.

★ U. S. Government Printing Office 1975— 614—214—516

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DON D. BUCHWALD being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 2nd day of June, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

MARK Lemle Amsterdam, Esq.
12 Bedford Street
New York, New York 10014

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Don D. Buchwald
DON D. BUCHWALD

Sworn to before me this
2nd day of June, 1975
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1976